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No. 84-760

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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1984

ROSE HALL LIMITED,

Petitioner,

v.

CHASE MANHATTAN OVERSEAS BANKING CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION AND APPENDIX

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HHPP

QUESTIONS PRESENTED

Pursuant to Supreme Court Rule 34.2, respondent Chase Manhattan Overseas Banking Corporation ("CMOBC") here restates the questions presented which are inaccurately stated in the petition of Rose Hall Limited for a writ of certiorari (P i-ii).*

The first two questions stated in the petition are *not* properly presented to this Court because they were abandoned in the courts below. If those two questions had been preserved for presentation to this Court, they would properly be framed as follows:

> 1. Do the provisions of the Federal Reserve Act, 12 U.S.C. §§601-32, and related regulations render an Edge corporation organized under those provisions automatically liable as a matter of law for wrongs committed by its wholly-owned subsidiary?
>
> 2. Is petitioner entitled to judgment on the theory that CMOBC fraudulently "stripped" its subsidiary of assets where there was no evidence that CMOBC controlled the alleged "stripping" and the courts below determined as a factual matter that CMOBC never received anything of value from its subsidiary?

The petition misleadingly presents the third question — whether plaintiff may base its cause of action against CMOBC upon an alleged misrepresentation in a Jamaican tribunal — as one of federal law. Petitioner conceded in the Court of Appeals that the point is controlled by *Jamaican* law. Even if the Court were to decide this Jamaican law question in favor of petitioner, the result would not change

* Throughout this response, the petition for a writ of certiorari is cited as "P___," petitioner's appendix is cited as "A___," CMOBC's appendix is cited as "B___," and the joint appendix filed below in the Court of Appeals is cited as "___a." References to "PX___" and "DXC___" are to the trial exhibits of plaintiff and CMOBC, respectively, references to "TR___" are to the trial transcript below, and references to "Dkt. ___" are to the District Court docket.

because the judgment below also rests upon an independent factual ground — the absence of any evidence that CMOBC controlled the asserted fraud on the Jamaican court. Thus, the question presented is properly framed as follows:

> 3. (a) May a civil action for damages under Jamaican law be based upon alleged perjury in a prior judicial proceeding?
>
> (b) If so, under the facts of this case, did CMOBC control the alleged fraud in the prior proceeding?

Finally, the judgment at issue is supported by grounds independent of those relied upon by the courts below. The judgment must be affirmed if either of the following questions is answered in the negative:

> 4. Did petitioner's evidence of fraud, which was found by the District Court to be "scarce and contradictory," amount to clear and convincing proof sufficient to establish fraud under Jamaican law?
>
> 5. Under Jamaican law, does a secured creditor's duty of good faith require it to delay or forego sale of collateral upon the borrower's default in order (a) to assist the borrower to embark on major litigation against a third party and (b) to subdivide and develop land that the borrower had mortgaged as a whole?

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RULE 28.1 LISTING OF PARENTS, SUBSIDIARIES AND AFFILIATES

Chase Manhattan Overseas Banking Corporation is wholly owned by The Chase Manhattan Bank, N.A., which in turn is wholly owned by The Chase Manhattan Corporation. The following is a list of the subsidiaries (except wholly owned subsidiaries) and affiliates of each of them:

Diamond Lease Company Ltd.
AOI Lease Co., Ltd.
Chiyoda Lease Co., Ltd.
Dai Shi Lease Co., Ltd.
Kitakanto Lease Co., Ltd.
Meiko Enterprise Co. Ltd.
Minami Kyushu Diamond Lease Co. Ltd.
MTBC Leasing Co., Ltd.
Nagano Lease Co., Ltd.
Nihon Dental Lease, K.K.
Ohita Lease Co., Ltd.
114 Lease Co., Ltd.
77 Lease Co., Ltd.
Sime Diamond Lease (Singapore) PTE. Ltd.
Yamagata Diamond Lease Co., Ltd.
Union Provinciale Immobiliere, S.A.
Video Corporation of America
Purcoil (One) Limited
Purcoil (Two) Limited
Amanah Chase Merchant Bank Berhad
Arrendadora Cremi, S.A.
Banco de Investimentos Lar Brasileiro, S.A.
Banco del Comercio
Ahorramas Corporacion de Ahorro Y Vivienda
Almacenadora del Comercio De Depositos Generales, S.A.
Almacenera del Peru, S.A.

Banco Central Hipotecario
Corporacion Financiera De Caldas
Corporacion Financiera del Tolima
Acero Estructural del Tolima, Ltda.
Corporacion Forestal del Tolima, Ltda.
Corporacion Financiera Del Valle
Corporacion Grancolombiana De Ahorro Y Vivienda, S.A.
Banco Lar Brasileiro, S.A.
LMS Imoveis Limitada
Leasing Lar Brasileiro, S.A.
Institut de Reescompte Et De Garantie
Banque De Reescompte Et De Placement (B.A.R.E.P.)
Banque Ivoirienne de Developpement Industriel
Calabar Veneer & Plywood Ltd.
Caribbean Financial Services Corporation
Centrale de Livraison de Valeurs Mobilieres, (CEDEL) S.A.
Chase Manhattan Cameroon, S.A.
Chase Manhattan Bank (Austria), A.G.
Chase Merchant Bank Nigeria Limited
The Chase National Bank (Egypt), S.A.E.
Chase-N.B.A. Group Ltd.
Oceania Capital Corporation, Limited
Chase-N.B.A. Securities, Ltd.
Credit Guarantee Corporation — Malaysia Berhad
Cross River Mills Limited
Hong Kong Commodities Guarantee Corporation
The International Investment Corporation for Yugoslavia, S.A.
Inversiones Atlantida, S.A.
Arrendamiento Y Credito, S.A.
Atlantic Bank, Ltd.
Banco Atlantida, S.A.

Azucarera Central, S.A.
Compania Almacenadora, S.A.
Compania Azucarera Choluteca, S.A.
Compania Azucarera Yogoa, S.A.
Papeles Y Cartones, S.A.
Casa Propia Asociacion de Ahorro Y Prestamo, S.A.
Casa Y Terrenos, S.A.
Compania Almacenadora, S.A.
Fomento e Inversiones, S.A.
Hoteles De Honduras, S.A.
Publicitaria Tecnica Hondurena
Latin American Agribusiness Development Corporation
Libra Bank Limited
Manufacturera Latino-Americana, S.A.
Fabrica Nacional De Sacos, S.A.
Global Trading International Corporation, S.A.
Polisac, S.A.
Wilmington International Corporation
National Bank for Industrial and Touristic Development
National Investment Bank for Industrial Development, S.A.
Belgo-Factors N.V.
N.V. Internationaal Automatiserings Centrum
Groningse Maatschappij tot Stadherstel N.V.
Lease Plan Holding N.V.
B.V. Aannemersbedrijf Dubbers-Malden
Eurofestival B.V.
Grodex Karnavals — en Feestartikelen B.V.
Metaal-en Kunstofverw. Industrie Nautilus B.V.
Schuttevaerweg Holding B.V.
Stoffen Palet B.V.
Transmark Holding B.V.
Nederlandse Participatie Maatschappij, N.V.

Nieuw Rotterdam Beheer N.V.
Nieuw Rotterdam Læven N.V.
Maatschappij Doelenstraat B.V.
Nigerian Textile Mills, Ltd.
Octogonal Empreendimentos Ltda.
P.T. Chase Leasing Indonesia
Peruinvest — Compania de Fomento E Inversiones, S.A.
Private Export Funding Corporation
Saudi Investment Banking Corporation
Societe Forestiere et Industrielle de Belabo (Sofibel)
Societe Textile de Kisangani (SOTEXKI)
Union Financiere Pour Le Development De L'Economie Cerealiere (Unigrains)
Societe de Developpement Regional Antilles

STATEMENT OF THE CASE

The petition for certiorari now before the Court is the latest installment in a lengthy and factually complex barrage of litigation instituted by the petitioner, Rose Hall Limited (hereinafter "plaintiff" or "Rose Hall") in three separate jurisdictions. The transaction which underlies all of plaintiff's claims was the foreclosure sale of certain of plaintiff's Jamaican property by Chase Merchant Bankers Jamaica, Ltd. ("Chase Jamaica"), a Jamaican subsidiary of respondent, Chase Manhattan Overseas Banking Corporation ("CMOBC"). In this action, plaintiff alleged that the price obtained by Chase Jamaica in the foreclosure sale was inadequate and asserted several theories to hold CMOBC liable.

The dispute arose out of a speculative development scheme gone sour. In the mid-1960's, plaintiff, a Cayman Islands corporation, had invested in a large tract of undeveloped land near Montego Bay, Jamaica, which it hoped to develop into hotels, condominiums and other resort properties. In 1974 plaintiff borrowed $3,000,000 from Chase Jamaica, mortgaging 3,000 acres of the undeveloped land and pledging the stock of plaintiff's subsidiary (Rose Hall (H.I.) Ltd.) which owned a nearby hotel leased to the Holiday Inn chain (A-5 to A-6). Plaintiff immediately went into default on the loan (A-6).

Under Jamaican law, Chase Jamaica had the right to sell its security forthwith upon plaintiff's default (A-77), but it forebore from doing so for almost two years, relying on certain assurances by plaintiff which proved to be false. First, plaintiff assured Chase Jamaica that plaintiff's sole principal, John W. Rollins, whose net worth exceeded $54 million at the time (4920-27a), would personally guarantee the loan (DXC 271; TR 10,791-92). This guarantee was never given.[1] Second, plaintiff assured Chase Jamaica that it would

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1. Chase Jamaica eventually was told that the guarantee "could not" be given (DXC 405 at 3-4; TR 10,791-92). Rollins initially claimed that his other bank obligations legally prohibited a guarantee (TR 3677).

soon effect a sale of the hotel to the Jamaican Government for $13 million that would permit Chase Jamaica to be paid $1.25 million on its loan if Chase Jamaica would agree to release its liens on the hotel to permit the sale (4370a, 4382a; DXC 356). Despite the fact that two-thirds of the loan would remain unpaid after this collateral was released, Chase Jamaica cooperated to accomplish the proposed sale (918a, 4367a). But while negotiations for the sale were underway, occupancy rates for the hotel plunged dramatically (see TR 13,207; DXC 963(2) at 25) and the hotel's income fell short of plaintiff's projections which had formed the basis for the proposed $13 million sale (2632-33a; see 4886a).[2]

The evidence below plainly demonstrated that plaintiff had picked an inopportune time to speculate in resort development in Jamaica. As noted by the District Court, conditions in Jamaica deteriorated rapidly after plaintiff began negotiating with the Government for a $13 million sale in 1975:

> During the spring and summer of 1976, political and economic conditions in Jamaica deteriorated. Under Prime Minister Michael Manley, leader of the People's National Party ("P.N.P."), the government moved to the left in foreign and domestic policy and created widespread apprehension, flight of capital, and political violence on the island. This culminated in the declaration of a national State of Emergency on June 19, 1976. As a result, tourism and resort development declined dramatically.

NOTES *(Continued)*

but Rose Hall abandoned that claim at trial after bank records subpoenaed by CMOBC in discovery proved the claim to be baseless (see TR 14,410).

2. The Government's negotiator, Mr. Matalon, determined that a condition of the purchase — that revenues be sufficient to support the proposed debt on the hotel (TR 7575, 11,026-27) — would not be achieved (3437a). In addition, the hotel's tenant, a subsidiary of Holiday Inns, Inc., made it known that it was an unhappy tenant (A-6 to A-7) and wanted to renegotiate its highly unprofitable lease (3436a).

Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., 566 F.Supp 1558, 1562 (D.Del. 1983).[3] A Jamaican court described conditions in 1976 in even starker terms:

> I have regard to the conditions then [in 1976] obtaining in the country so widespread and notorious that I can take Judicial Notice of them. Violence stalked the land, murders were commonplace, Public Opinion was outraged. Fear abounded.

The Gleaner Company Ltd. v. JBC and Ken Maxwell, Suit No. C.L. 025/1976 at 20 (Supreme Court of Judicature of Jamaica, Slip Opinion of July 26, 1982) (B-11).

Not surprisingly, plaintiff's proposed sale of the hotel fell through, and in late summer 1976 Chase Jamaica assumed principal responsibility for the sales efforts (A-7 to A-8). On the advice of plaintiff's Jamaican real estate experts, Chase Jamaica did not put the property up for auction (3575a, 3581a) but attempted to revive negotiations with the Jamaican Government, the only prospective buyer (3491a). After rejecting Chase Jamaica's overtures to sell the hotel even at a reduced price, the Government expressed its willingness to buy the hotel along with the land pledged to Chase Jamaica for $9.5 million, but only on condition that Chase Jamaica arrange for 154% financing of the purchase price (3457a). Chase Jamaica agreed. Having calculated the collateral to be worth only $8.3 million, Chase Jamaica considered the price offered by the Government to be more than adequate (2027-34a, 2044-54a, 2102a). And although the Chase Manhattan Bank, N.A. (Chase Jamaica's

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3. This decline, which contributed to the worst economic depression in Jamaica's history (2559a), sent hotel prices plummeting to levels that appeared to be enormous bargains relative to earlier values. For instance, Ramada Inns, which had purchased the Royal Caribbean Hotel, located a short distance from the Holiday Inn, for $5,000,000 in 1972, sold it for $500,000 in 1977 (2409a). Another smaller hotel in Montego Bay with a value estimated at $2,000,000 in 1974 was boarded up and abandoned by its owner in 1977 and later sold for $20,000 (2372-75a).

corporate grandparent) had previously decided to stop lending any money to the unstable Government (3917-18a), it agreed to provide the financing because the Government's offer was the "only possible immediate solution to the Rose Hall problem" (3451a). A contract of sale was entered into in October 1976 although the sale did not close until November 1977 (A-7 to A-8).

In the fall of 1976 plaintiff brought a suit for damages in Georgia against Holiday Inns, Inc. ("Holiday Inns") and an action to enjoin the sale in Jamaica against Chase Jamaica (A-8-9).[4] After both actions failed, plaintiff brought the present suit against CMOBC, seeking to hold it liable for the alleged wrongs of Chase Jamaica.

CMOBC promptly moved for summary judgment (Dkt. 452). Although the District Court agreed that plaintiff's complaint failed to state any basis for holding CMOBC liable, plaintiff was permitted to amend its complaint to allege that the Edge Act (12 U.S.C. §§601 *et seq.*) required CMOBC to control Chase Jamaica's sale of the collateral. *Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp.*, 494 F.Supp. 1139, 1154 (D.Del. 1980). At that stage of the litigation, plaintiff did "not take issue" with Chase Jamaica's status as a "separate and distinct entity" (*id.*), and three years of massive discovery followed with no assertion by plaintiff of any "fraud" by CMOBC. Less than two weeks before the beginning of trial, however, plaintiff was again permitted (over CMOBC's objection) to amend its complaint, this time to assert a veil-piercing theory based on a new allegation that Chase Jamaica had committed perjury in the Jamaican action (A-52 to A-54; A-131 to A-138).

A jury trial of the action consumed 81 trial days and generated voluminous evidence and legal submissions by the parties (A-3, A-5). During the trial, the District Court

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4. Plaintiff had blamed Holiday Inns, whose subsidiary was the tenant of the hotel, for the collapse of the earlier negotiations to sell the hotel to the Jamaican Government for $13 million. Plaintiff also joined Holiday Inns as a defendant in the present suit but has not sought this Court's review of the judgment below for Holiday Inns.

explicitly adopted a "plaintiff-favoring standard" in its rulings, expressing the hope that such an approach would avoid retrial in the event of a defense verdict (B-6 to B-7; A-92, A-109, n. 88). Pursuant to this approach, the District Court deferred until after the verdict a ruling on CMOBC's contention that one of plaintiff's theories — that CMOBC's liability could be premised on alleged perjury by a Chase Jamaica witness in the prior Jamaican litigation — should be dismissed for failing to state a claim and should not be permitted to go to the jury (A-23 to A-24).

The jury found that Chase Jamaica had obtained the best available price for the hotel company stock pledged by plaintiff to secure the loan (A-11 to A-12, ¶¶1, 6). But the jury concluded that plaintiff had suffered damage of $4,500,000 on the novel theory that Chase Jamaica "wrongfully" prevented plaintiff from bringing suit against Holiday Inns by selling the stock to the Jamaican Government (*id.*, ¶¶2, 6). In addition, the jury found that the land was worth $1,500,000 more than the $1,000,000 obtained by Chase Jamaica (*id.*, ¶¶1, 6), after having heard valuation testimony from plaintiff's expert which the District Court later recognized was "optimistic and speculative" and "irrelevant" to the value of the land in 1976 (A-125 to A-126).[5]

Regarding liability for the damages, the jury found that CMOBC did not control Chase Jamaica's sale of the collateral, notwithstanding the rebuttable presumption to the contrary imposed under the Edge Act by the District Court's instructions (A-12, ¶3). As to plaintiff's perjury theory, however, the jury found that Chase Jamaica "as a result of its

5. On the basis of an earlier version of the same inflated appraisal plaintiff initially had claimed compensatory damages of $72 million and punitive damages in the tens of millions of dollars. See 566 F.Supp. at 1581-83. Plaintiff's claim for punitive damages was dismissed by the District Court on the grounds that Jamaican law permits recovery of such damages only when the defendant is unjustly enriched by his conduct, and there had been no proof or even any allegation that Chase Jamaica or CMOBC had been unjustly enriched by the alleged wrongs here (810a).

control by CMOBC" had deceived the Jamaican court (*id.*, ¶4). On this basis, judgment was initially entered in plaintiff's favor. Thereafter, the District Court gave "the promised serious consideration of CMOBC's contention" that the perjury theory was legally groundless (A-24) and granted judgment notwithstanding the verdict in favor of CMOBC (see A-3 to A-52). Adopting the District Court's "thoughtful opinion" (A-2), the Court of Appeals affirmed this holding by a judgment order and denied rehearing. Plaintiff's petition for a writ of certiorari seeks review of that order.

SUMMARY OF ARGUMENT

1. The judgment below rests upon two *independent* grounds: first, as a matter of Jamaican law, a civil action for damages cannot be based in whole or in part upon alleged perjury in a prior judicial proceeding; and second, the factual record does not support the jury's finding that CMOBC controlled the alleged fraud in the Jamaican court. Neither ground presents a federal issue. Plaintiff's contention that federal law applies is belied by its concession in the Court of Appeals that the point is controlled by Jamaican law.

2. In the Court of Appeals, plaintiff abandoned its contention that Edge Act corporations are automatically liable for the acts of their foreign subsidiaries, and plaintiff may not renew that claim in this Court. Plaintiff's theory (a) runs against two cardinal principles of corporate law (limited liability and separation of ownership from management); (b) finds no support in the legislative history of the Edge Act; and (c) conflicts with the express terms of the statute itself.

3. Plaintiff's theory that CMOBC is liable for "stripping" Chase Jamaica of assets was neither submitted to the jury nor fairly presented to the District Court pursuant to Rules 49 and 50, Fed.R.Civ.P. The record contains no evidence that CMOBC ever controlled or received anything of value for the alleged "stripping." At all events, no federal issue is presented since the courts below did not reject any

federally recognized doctrine but simply found plaintiff's theory inapplicable under the particular facts of this case.

4. The judgment below is supported by independent grounds under Jamaican law. Plaintiff failed to prove by clear and convincing evidence that Chase Jamaica committed any fraud. Moreover, Chase Jamaica's sale of the land and corporate stock was entirely proper under applicable Jamaican law. Contrary to plaintiff's theory of recovery, Chase Jamaica was entitled to sell its collateral upon plaintiff's default and had absolutely no duty either to subdivide the mortgaged land for sale in lots, or to refrain from selling the pledged stock to help plaintiff sue Holiday Inns.

ARGUMENT

I. THE JUDGMENT BELOW WAS BASED UPON TWO INDEPENDENT GROUNDS — ONE OF JAMAICAN LAW AND ONE OF FACT — NEITHER OF WHICH MERITS THIS COURT'S REVIEW.

Only the third of plaintiff's three "Questions Presented" was fairly presented to the courts below. This was plaintiff's contention that CMOBC should be held liable based on the jury's findings that "Chase Jamaica, through its representations, as a result of its control by CMOBC, deceive[d] the Jamaican court into not enjoining the sale of the collateral" (A-12, ¶4). The courts below correctly rejected any liability based on this theory for two independent reasons: (1) under controlling Jamaican law a civil cause of action for damages may not be predicated in whole or in part on alleged perjury or misrepresentations in a prior proceeding, and (2) there was no evidence from which the jury properly could have concluded that CMOBC controlled the alleged misrepresentation in the Jamaican court (A-2; A-23 *ff*; A-45 *ff*).

The judgment below is supported by *both* grounds and plaintiff has supplied no reason for this Court to disturb it. First, this Court should not entertain plaintiff's complaint that the Jamaican law applied below is somehow inconsistent with "LONG-RECOGNIZED REMEDIAL POWERS

OF FEDERAL COURTS" (P 18; see also P 13, n. 4), since plaintiff conceded in oral argument below that the Court of Appeals should "apply Commonwealth law and not United States law . . . on this issue." (B-1). [6] "[A] challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 103 S.Ct. 2368, 2373, n.8 (1983). *A fortiori* there is no reason for this Court to grant certiorari on the foreign-law questions presented here.

The second basis for the judgment below was the *factual* determination that CMOBC did not control the alleged "fraud" in the Jamaican court. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Plaintiff's request that it do so here (P 26-28) should be denied. Indeed, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).[7]

The Court should decline to review this factual issue for the additional reason that plaintiff has violated Supreme Court Rules 21.3 and 21.4 by appending to its 30-page petition 24 pages of its appellate briefs which unsuccessfully argued that CMOBC controlled the alleged fraud (P 26-27, n. 16; A-166 to A-190).[8] CMOBC resists the temptation to append the pages from its briefs below that flatly refute each of plaintiff's arguments on the matter and, instead, respectfully refers this Court to the trial court's opinion below which, on the basis of a painstaking review of the mas-

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6. For the District Court's analysis to the same effect, see A-25.

7. Here, having considered all the contentions raised by plaintiff (A-2), the Court of Appeals affirmed on the basis of the District Court's opinion which included a factual finding that CMOBC did not control the fraud (A-45 to A-52).

8. Circuit courts have deplored the same practice as a violation of Federal Rule of Appellate Procedure 28(g). *Katz v. King*, 627 F.2d 568, 575 (1st Cir. 1980); *Bobsee Corp. v. United States*, 411 F.2d 231, 234, n. 2 (5th Cir. 1969).

sive record, soundly rejects plaintiff's argument that there is any evidence from which a jury could have determined that CMOBC controlled the alleged fraud (A-45 to A-52).

As a last resort, plaintiff argues that the Court should abolish the generally recognized control requirement in veil-piercing cases[9] and permit a "damaged plaintiff" to sue any member of an affiliated group of corporations, ignoring their separate corporate entities altogether (P 28-30). There is no reason for this Court to consider this desperate and unprecedented proposition which plaintiff did not develop in the courts below. A case involving the Jamaican acts of a Jamaican corporation in supposed violation of commercial duties imposed by Jamaican law is not an appropriate vehicle for reconsideration of the federal theory of the corporate veil.

In short, this factually tedious action governed by Jamaican law presents no issues of importance to anyone but the parties themselves. Plaintiff's petition for a writ of certiorari should be denied. Supreme Court Rule 17.1; *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

II. PLAINTIFF ABANDONED ITS MERITLESS "EDGE ACT" THEORY IN THE COURT OF APPEALS.

The District Court indulged plaintiff's Edge Act theory of liability far more than it deserved, instructing the jury (over CMOBC's objection) to presume under the Edge Act that CMOBC controlled the actions of Chase Jamaica unless CMOBC demonstrated otherwise (3127a). Notwithstanding that unjustified shift in the burden of proof, the jury found in response to Interrogatory 3 that CMOBC did *not* control Chase Jamaica's sale of the Rose Hall collateral (A-12, ¶3).

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9. *See, e.g.*, 1 Fletcher, *Cyclopedia Corporations*, §43.10 (perm.ed. 1983).

Of its 125 printed pages of briefing presented to the Court of Appeals, plaintiff devoted a scant few pages to its Edge Act theory, and in response to pointed questions at oral argument, abandoned the theory altogether in favor of the misrepresentation arguments based on Interrogatory 4 (B-1 to B-3):

> JUDGE GREEN: What about Interrogatory No. 3? Doesn't that cover all the other possible causes of action, which was answered no, that CMOBC did not control Chase's major decisions in any other regard?
>
> MR. KIRKPATRICK: Your Honor, that was related to Chase's major decisions with respect to the sale of the collateral.
>
> * * *
>
> JUDGE GREEN: But you're saying here that you should collect from CMOBC because of the collateral sale?
>
> MR. KIRKPATRICK: We should collect for the collateral sale.
>
> JUDGE GREEN: Yes.
>
> MR. KIRKPATRICK: Because of the deception of the Jamaican court into thinking that Chase Jamaica would be good for damages and the subsequent liquidation of Chase Jamaica.
>
> * * *
>
> JUDGE GREEN: Do you eliminate altogether Interrogatory No. 3 on the piercing theory?
>
> MR. KIRKPATRICK: Yes, sir.
>
> JUDGE GREEN: Because the answer to that is against you.
>
> MR. KIRKPATRICK: Yes, it is.
>
> JUDGE GREEN: And that covers every other theory except the deception theory.

MR. KIRKPATRICK: I would say it doesn't cover the piercing theory with an innocent misrepresentation.

JUDGE GREEN: What does it fail to cover?

MR. KIRKPATRICK: An innocent misrepresentation, something that wouldn't have been a cause of action in and of itself.

Having thus abandoned its Edge Act theory at oral argument, plaintiff also omitted this ground from its petition for rehearing to the Court of Appeals (B-4). This Court should not grant a writ of certiorari to consider an issue that plaintiff did not deem sufficiently important to press in the Court of Appeals. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970).

Plaintiff's Edge Act theory is, in all events, contrived and implausible on its face. It requires a finding that the Edge Act impliedly abrogated two basic tenets of the law of corporations: first "the fundamental concept that the corporation is a separate legal entity distinct from its stockholders;"[10] and second, the basic proposition that "the corporation inherently involves a separation of ownership (in the shareholders) and management (in the board of directors)."[11] Had Congress intended to depart from these principles in the case of foreign subsidiaries of Edge corporations, it surely would have done so in clear and unambiguous terms. As the courts below agreed, however, there is absolutely no indication whatsoever in the statute or its legislative history "that subsidiaries of Edge Act corporations should be treated any differently than subsidiaries of any

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10. Powell, *Parent and Subsidiary Corporations* §1 at 1 (1931).

11. Henn, *Handbook of the Law of Corporations* §188 at 363 (2d ed. 1970).

other corporation" (A-105 to A-106).[12]

Plaintiff does nothing to rebut the comprehensively documented rejection of its Edge Act theory contained in the opinion below (A-96 to A-120). On the facts, plaintiff relies on one writer's general perceptions about how Edge subsidiaries operated " 'for the most part' " eighteen years ago (P 10), ignoring the pertinent evidentiary record and the special verdict which establish that Chase Jamaica in fact operated independently in this case (A-12, ¶3). On the law, plaintiff quotes selectively from Federal Reserve Board regulations, omitting material portions which undercut its contentions.[13] As the uncontradicted testimony established below, the Federal Reserve Board has never taken the position that CMOBC should "control the affairs of its subsidiaries" (2267a). But even if, *arguendo*, CMOBC's failure to exercise control over Chase Jamaica somehow violated the

12. Plaintiff's theory that an Edge corporation is automatically liable for a foreign subsidiary's debt is inconsistent with the statute as written. The Edge Act limits equity participation by an Edge corporation in a foreign subsidiary to 10% of the Edge corporation's capital and surplus (or 15% if the foreign subsidiary is engaged in banking). 12 U.S.C. §615(c). As noted below, this section seeks to "diversify risks," and does not on its face "limit liability" (A-106, n.85). But the section would not operate to diversify risk if, as plaintiff contends, the Edge Act corporation were automatically liable to the full extent of its capital and surplus for all obligations of each of its subsidiaries. Section 615(c) can "diversify risks" only if the Edge corporation enjoys the normal shareholder's privilege of liability that is limited to the extent of its investment in each subsidiary. Thus, plaintiff's contention that CMOBC is automatically or presumptively liable for the debts of a foreign subsidiary is contrary to the express terms of the Edge Act.

13. Plaintiff quotes part of Regulation M, 12 C.F.R. §213.104(c) (1973-79) (P 9) in an effort to show that Edge corporations are required to supervise their subsidiaries in a way that precludes limited liability, omitting that part of the regulation which states that the system of records, controls and reports required to carry out such supervision is simply one "that will keep the bank's management informed of the activities and condition of its branches and subsidiaries" (see A-160). As the opinion below pointed out, "[s]uch supervision . . . is not tantamount to control. It simply serves an informational and regulatory purpose to ensure the financial health of the Edge Act corporation." (A-103).

Edge Act, the Federal Reserve Board has ample power to remedy the violation. See 12 U.S.C. §622.

Plaintiff does not advance its cause by citing 12 U.S.C. §632. That section "[o]f course . . . is jurisdictional," as plaintiff conceded below (Rose Hall's Response Brief on Appeal at 34). "The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the . . . Act which they seek to enforce, not in the jurisdictional provision." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 (1979). Indeed, pertinent cases decided under Section 632 make clear that it has no substantive effect of its own. The statute is simply "meant to give a federal forum to nationally chartered banks" and to establish a "federal choice of law rule" which, in this case, mandates the application of Jamaican law. *See Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (Venezuelan law governs the issue of an alleged fraud in Venezuela); *Citibank, N.A. v. Benkoczy*, 561 F.Supp. 184, 186, n.3 (S.D.Fla. 1983) (Haitian law governs any obligations under a Haitian contract of guaranty). Section 632 of Title 12 is not even part of the Edge Act and has no particular application to Edge corporations. *Travis v. National City Bank of New York*, 23 F.Supp. 363, 367 (E.D.N.Y. 1938). The statute simply will not support the burden plaintiff's novel theory places on it.

Plaintiff's abandonment of the Edge Act theory in the Court of Appeals, after its rejection by the jury and the District Court, lays the theory to a well-deserved rest which need not be disturbed by this Court.

III. PLAINTIFF'S "STRIPPING" ARGUMENT WAS NOT PRESERVED IN THE DISTRICT COURT AND LACKS IMPORTANCE OR MERIT IN ANY EVENT.

Plaintiff never requested a special interrogatory in connection with its allegation that CMOBC should be held liable for purportedly "stripping" Chase Jamaica of assets (P 12-17). Consequently, that claim was never submitted to

the jury. Plaintiff did not ask the District Court to make supplemental findings pursuant to Rule 49(a), Fed.R.Civ.P. to support such a basis of liability, nor did plaintiff move for a directed verdict or for judgment notwithstanding the verdict on this basis. Thus, when plaintiff raised the issue at oral argument, the Court of Appeals pointed out that the question before it was the alleged misrepresentation encompassed in Interrogatory 4 (B-1, B-2), not the broader theory of "inequity" that plaintiff had failed to preserve for appeal. The United States Court of Appeals for the Third Circuit, like this Court, does not address issues raised for the first time on appeal. *United States v. Riccobene*, 709 F.2d 214, 229 (3d Cir.), *cert. denied*, 104 S.Ct. 157 (1983), *citing Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). By the same token, this Court should not grant a writ of certiorari to consider a claim which was not submitted to the jury and which plaintiff did not preserve under Rules 49 and 50, Fed.R.Civ.P. *See Tyrrell v. District of Columbia*, 243 U.S. 1, 6 (1917) (It is the duty of this Court to dismiss a writ of certiorari as improvidently granted where the writ involves a theory of liability which was neither submitted to the jury nor preserved for appeal).[14]

Plaintiff has attempted to create the impression that there is some dispute among the federal courts over the interpretation of the veil-piercing doctrine and has asserted that this doctrine needs "clarification" because the result below was different from the result in three cases cited by plaintiff (P 12).[15] It is mystifying that plaintiff seeks "clarification" of a doctrine the application of which, according

14. Even if plaintiff's failure to preserve the claim in the District Court could be overlooked, this Court in its discretion should deny certiorari since the point was not addressed in the opinion of the Court of Appeals. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975).

15. *Pepper v. Litton*, 308 U.S. 295 (1939); *Federal Deposit Ins. Corp. v. Sea Pines Co.*, 692 F.2d 973, 976 (4th Cir. 1982), *cert. denied*, 103 S.Ct. 2089 (1983); *United Rubber Workers v. Great American Industries, Inc.*, 479 F.Supp. 216, 245-46 (S.D.N.Y. 1979).

to plaintiff, " 'depend[s] upon the circumstances,' " defies " 'any verbalization of the test in a mechanical manner,' " and requires that " 'each case must be considered on its own facts.' " (P 15, n. 6). A doctrine so closely tied to particular factual circumstances is not a likely candidate for doctrinal "clarification." Moreover, that different facts lead to different conclusions pursuant to the doctrine does not support any claim of a "conflict" of decisions among the circuits or within any one of them.[16]

On the particular facts of *this* case the courts below quite properly found that there was no stripping of assets that rendered CMOBC liable for its subsidiary's debts:

> Plaintiff's inflammatory label of "stripping the assets" obscures reality. Plaintiff does not dispute that CMOBC did not in any way profit or receive any assets from the "stripping" which in reality consisted of selling off Chase Jamaica's loan portfolio and paying off its non-contingent creditors, including other Chase entities. There is nothing remotely approaching fraud in a wholly owned subsidiary paying off creditors upon closing its business even though there is outstanding a contingent claim to be resolved at some future time via the vagaries of the litigation process.

(A-39-40). Indeed, there was not a shred of evidence in the record that CMOBC controlled the alleged stripping or received any benefit from it. CMOBC never received a dividend from Chase Jamaica, liquidating or otherwise (2263a). Neither jury nor court found that CMOBC was in any way involved with Chase Jamaica's payment of its non-

16. Plaintiff's own citation (P 14) shows that " 'siphoning of funds' " by the majority shareholder is as much a basis for veil-piercing in the Third Circuit as in the Fourth Circuit, the Southern District of New York or anywhere else. *United States v. Pisani*, 646 F.2d 83, 88 (3d Cir. 1981). Thus the decisions cited by plaintiff are "really in harmony and not in conflict" and there is "no ground for . . . allowing the writ of certiorari to add to an already burdened docket." *Layne & Bowler Corp., supra*, 261 U.S. at 392-93.

contingent creditors when it closed its office, and plaintiff's casual reference to "CMOBC's liquidation of Chase Jamaica" (P 17), without so much as a record citation, is irresponsible.

IV. CERTIORARI IS NOT APPROPRIATE IN THIS CASE BECAUSE THE RESULT BELOW IS SUPPORTED INDEPENDENTLY BY THE RECORD AND BY PRINCIPLES OF JAMAICAN COMMERCIAL LAW.

"It is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum v. Bacon*, 457 U.S. 132, 137, n. 5 (1982); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *United States v. American Ry. Express Co.*, 265 U.S. 425, 435-36 (1924). This is so even though the argument of appellee or respondent "may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *American Ry. Express Co., supra*, 265 U.S. at 435.

In the District Court and the Court of Appeals, CMOBC sought judgment notwithstanding the verdict not only on the basis of Chase Jamaica's status as a separate corporate entity but also because plaintiff had no valid claim against Chase Jamaica in the first instance (A-40 *ff.*, A-60 *ff.*, A-75 *ff.*). Plaintiff's "evidence" that Chase Jamaica committed "fraud" on the Jamaican court was found to be "scarce and contradictory" and "disquieting" by the District Judge, although in dicta he declined to overturn the verdict on this point (A-41-42, A-44-45). As a matter of law, however, evidence that is "scarce and contradictory" cannot meet the clear and convincing standard necessary to establish fraud under Jamaican law (see A-41, n. 33). Plaintiff thus failed to prove by a sufficient quantum of evidence that any fraud was committed by a Chase Jamaica employee or by anyone else.

Plaintiff's claim that Chase Jamaica breached its duties as a secured creditor was based on the following proposi-

tions which are commercially unworkable and totally untenable under Jamaican law:

> 1. A pledgee of corporate stock must embark upon major litigation before selling the collateral, if this is demanded by the debtor in default (A-60-61); and
>
> 2. A mortgagee of undeveloped land must subdivide and develop the land before selling it, even though the defaulting mortgagor was unwilling or unable to do so (A-75 *ff.*).

The District Court purported to derive these "duties" from Commonwealth precedent requiring secured creditors to act in "good faith" (A-61, A-76). But the secured creditor's duty of good faith in the disposition of collateral is nothing more than the obligation "not to cheat" the borrower. *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*, [1971] 1 Ch. 949, 966 (C.A.). Upon default, the secured creditor has the right to sell his security immediately, even in a depressed market, and to prefer his own interests "as he sees them" to those of the mortgagor. *Id.* at 968-69.

Where, as the jury found here (A-12, ¶6(b)), the creditor sells pledged or mortgaged stock "at a fair and proper price," the defaulting debtor "has no cause of action in respect thereof," *Belton v. Bass, Ratcliffe and Gretton, Limited*, [1922] 2 Ch. 449, 466; Brown, *Personal Property*, §15.8 at 493 (3d ed. 1975). Thus in the Jamaican litigation between plaintiff and Chase Jamaica, the court rejected plaintiff's claim that Chase Jamaica had any duty to facilitate plaintiff's lawsuit against Holiday Inns. *Rose Hall, Ltd. v. Chase Merchant Bankers Jamaica, Ltd.*, Suit No. E 211 of 1976 at 12-13 (Supreme Court of Judicature of Jamaica, Slip Opinion of January 27, 1977) (B-8 to B-9).

Plaintiff's contention that Chase Jamaica had a duty to subdivide the 3,000 acres of undeveloped land for sale in lots is expressly negated by Section 106 of the Registration of Titles Act of Jamaica which provides that upon default the mortgagee "may sell the land mortgaged or charged, or

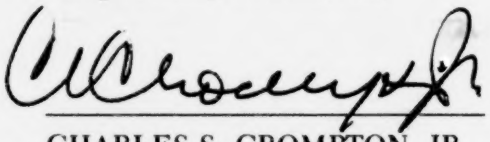
any part thereof, either altogether or in lots . . . and resell in manner aforesaid, without being liable to the mortgagor or grantor for any loss occasioned thereby" (A-165). And only last year the Privy Council (the court of last resort for Commonwealth nations including Jamaica) reaffirmed the common law rule that "[t]he mortgagee is not . . . bound to postpone the sale in the hope of obtaining a better price or to adopt a piecemeal method of sale which could only be carried out over a substantial period or at some risk of loss." *Tse Kwong Lam v. Wong Chit Sen*, [1983] 3 All E.R. 54, 59, 64 (P.C.).

Since there are adequate, independent grounds under Jamaican law to sustain the judgment below, plaintiff's petition for certiorari should be denied.

CONCLUSION

For the foregoing reasons this Court should deny Rose Hall's petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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December 7, 1984

APPENDIX

EXCERPTS FROM TRANSCRIPT OF ORAL ARGUMENT IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JULY 10, 1984; HIGGINBOTHAM, SLOVITER AND GREEN, JJ.)

* * *

[pp. 9-10] JUDGE HIGGINBOTHAM: But the interrogatory isn't stated as broadly as you have just suggested for the charge. The interrogatory, as I read it, was limited specifically to one event which occurred in the Jamaican court.

MR. KIRKPATRICK: Your Honor, that's exactly correct. It was indeed. The other elements or facts were not themselves in dispute and Judge Steel's charge to the jury on Interrogatory 4—

JUDGE HIGGINBOTHAM: Can you help me a little on that? You say the other elements were not in dispute. No one conceded fraud except for deceiving the Jamaican court. It seems to me that the fraud issue was disputed all the time by CMOBC.

MR. KIRKPATRICK: Oh, it was hotly contested. No question about that.

* * *

[p. 14] JUDGE SLOVITER: You agree, I gather, that we apply Commonwealth law and not United States law?

MR. KIRKPATRICK: Yes, your Honor.

JUDGE SLOVITER: On this issue.

MR. KIRKPATRICK: Yes, your Honor, I do. We have found no English authority which really considers this question of vicarious claim of the immunity. The American courts have, and they say the immunity — most of them at least — that the immunity is personal and cannot be vicariously claimed, and the Restatement speaks rather eloquently on the topic. And we say in those circumstances where there is no Commonwealth authority and there is a clear weight of authority in this country, it indicates what a common law court would do.

* * *

[pp. 16-17] JUDGE GREEN: What about Interrogatory No.

3? Doesn't that cover all the other possible causes of action, which was answered no, that CMOBC did not control Chase's major decisions in any other regard?

MR. KIRKPATRICK: Your Honor, that was related to Chase's major decisions with respect to the sale of the collateral.

JUDGE GREEN: Yes.

MR. KIRKPATRICK: And that does determine that the CMOBC, the parent, was not controlling the collateral sale. And we don't claim that it's responsible for that reason. We say that it becomes involved in the cause of action for sale of the collateral.

JUDGE GREEN: But you're saying here that you should collect from CMOBC because of the collateral sale?

MR. KIRKPATRICK: We should collect for the collateral sale.

JUDGE GREEN: Yes.

MR. KIRKPATRICK: Because of the deception of the Jamaican court into thinking that Chase Jamaica would be good for damages and the subsequent liquidation of Chase Jamaica.

* * *

[pp. 49-50] MR. KIRKPATRICK: Our legal position, Your Honor, was simply that it did not have to be a deception in the sense of something that would constitute a cause of action.

JUDGE SLOVITER: But that's not what's really before us. I mean, whatever it had to be, what we have before us is in your favor a holding, a jury finding, that there was deception and the question is given that deception what happens now.

MR. KIRKPATRICK: My only point, Your Honor, was that even if it hadn't been the deception but the court had been innocently misled, we would still have our piercing theory.

The other point is this: There is—

JUDGE GREEN: Is this—well, wouldn't you have a piercing—

MR. KIRKPATRICK: Sorry.

JUDGE GREEN: Do you eliminate altogether Interrogatory No. 3 on the piercing theory?

MR. KIRKPATRICK: Yes, sir.

JUDGE GREEN: Because the answer to that is against you.

MR. KIRKPATRICK: Yes, it is.

JUDGE GREEN: And that covers every other theory except the deception theory.

MR. KIRKPATRICK: I would say it doesn't cover the piercing theory with an innocent misrepresentation.

JUDGE GREEN: What does it fail to cover? 3—

MR. KIRKPATRICK: An innocent misrepresentation, something that wouldn't have been a cause of action in and of itself.

My final point is this—

JUDGE HIGGINBOTHAM: If you had won on Interrogatory No. 3.—

JUDGE SLOVITER: That's it.

MR. KIRKPATRICK: We would have won.

* * *

EXCERPTS FROM PETITION OF PLAINTIFF-APPELLANT ROSE HALL LIMITED FOR REHEARING UNDER F.R.A.P. 40 AND REHEARING EN BANC UNDER F.R.A.P. 35 DATED JULY 27, 1984

* * *

[p. v] CERTIFICATION

I, the undersigned attorney, express a belief, based on a reasoned and studied professional judgment, that this appeal involves four questions of exceptional importance, to wit:

(1) Whether equity has power to disregard the separate entity of a judgment-proof subsidiary corporation to circumvent a fraud, inequity or injustice, because when a corporation is failing or insolvent those who control it owe an equitable duty to all creditors, which they breach by preferentially paying or securing debts the subsidiary owes to themselves, their relatives or affiliates, and,

(2) Whether in such circumstances any immunity forbids equity from taking cognizance of the fact that a court was earlier led to withhold an injunction of impending wrongs against plaintiff, on the basis of deceptive representations that plaintiff would have an adequate remedy in damages against the subsidiary because of parent company support, and

(3) Whether the court below correctly applied foreign law as to the purported immunity, when 12 U.S.C. §632 provides the question is governed by "the laws of the United States," and

(4) Whether a party who wins a Rule 49(a) special jury verdict involving a theory subject to some legal bar, should be denied judgment on lesser included theories supported by the verdict and not subject to such bar.

* * *

[p. 15] MORRIS, NICHOLS, ARSHT & TUNNELL

[s] Paul Welsh

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July 27, 1984

EXCERPTS FROM TRIAL TRANSCRIPT

* * *

[p. 5434 THE COURT:] But if I am going to make errors on this case, I would rather make the errors in admitting evidence than by keeping evidence out. If I act erroneously in admitting evidence, the verdict can take care of that error, if it's a verdict against the plaintiff. And if it's for the plaintiff, I can have a look at it, and the Court of Appeals can have a look at it.

So that's kind of my point of view about this, not that I am going to let everything in without giving any consideration to it. But I will hear Justice Robinson when we come back.

(Luncheon recess taken.)

* * *

[pp. 6442-43 THE COURT:] This case has consumed, someone said, nine weeks, and has involved I think between six and seven thousand pages of the record, with hundreds of exhibits. And I had indicated once or twice before that—I remember I said once before, Mr. Reid, where you had motions for a summary judgment, and I said, well, I don't know whether I put it this way, but I better make mistakes in denying them rather than make mistakes in granting them, and I feel that way now. And the [defendants' motions for a directed verdict] will not be granted, but I can assure the litigants that when their motions for judgment N.O.V., if that should ever be required, very serious consideration will be given to those motions.

* * *

[pp. 15,446-47] THE COURT: Well, I haven't reached, as a result of these arguments, any conclusion as to what I am going to do. I am going to think about it. But I am going to say now what I said before. I think if I have too much of a question about what should be submitted to the jury, and I decide these close questions in favor of the plaintiff, then the defendants have a right to clear that up.

On the other hand, if I decide them in favor of the defendants, and the plaintiff doesn't get a verdict, then the

plaintiff—if I made a mistake in favor of the defendants, the plaintiff can try the case only after we go through this again.

I think I am right about that approach, and it's an approach I have had.

Anyway, I will consider what has been submitted.

* * *

EXCERPT FROM *ROSE HALL, LTD. V. CHASE MERCHANT BANKERS JAMAICA, LTD.*, SUIT NO. E. 211 OF 1976 (SUPREME COURT OF JUDICATURE OF JAMAICA, SLIP OPINION DATED JANUARY 27, 1977, pp. 12-13)

IN THE
SUPREME COURT OF JUDICATURE
OF JAMAICA

Suit No. E. 211 of 1976

Between

Rose Hall Limited
Rose Hall (Developments) Limited

Plaintiffs

And

Chase Merchant Bankers Ja. Limited
Rose Hall (H.I.) Limited

Defendants

Heard: October 26, 27, 28, 29

November 2, 3, 4, 22, 1976

Richard Mahfood, Q.C., and Lloyd Barnett, instructed by Clinton Hart and Company for plaintiffs.

Norman Hill, Q.C., instructed by Judah, Desnoes and Company for first defendant.

David Muirhead, Q.C., instructed by Judah, Desnoes and Company for second defendant.

* * *

[*Rowe, J.*:]

Complaint is made by the plaintiffs that [Rose Hall (H.I.), under Chase Jamaica's control] refused permission for the plaintiffs to bring an action against Holiday Inns in the name of [Rose Hall (H.I.)], for unlawful interference in the plaintiffs' negotiations with the Urban Development

Corporation. That refusal, taken by itself, or cumulatively with the plaintiffs' other complaints is in my view no evidence of bad faith on the part of the defendants. The defendants must perforce continue to do business with Holiday Inns and it would be inimical to the defendants' interests to be engaged in a lawsuit against Holiday Inns.

* * *

EXCERPT FROM *THE GLEANER COMPANY LTD. V. JBC AND KEN MAXWELL*, SUIT NO. C.L. 025/1976 (SUPREME COURT OF JUDICATURE OF JAMAICA, SLIP OPINION DATED JULY 26, 1982, pp. 1, 20-22)

IN THE
SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. C.L. 025/1976

BETWEEN THE GLEANER COMPANY LTD.
Plaintiff

AND JAMAICA BROADCASTING CORPORATION

AND JOHN MAXWELL
Defendants

Ronald Williams Q.C. (with him Leo Rhynie Q.C.) for Plaintiff.

Muirhead Q.C. (with him Shelton) for first-named Defendant.

Knight (with him Pickersgill) for second-named Defendant.

HEARD ON: Divers days in January, 1980, November, 1981 and March, 1982

JUDGMENT

Vanderpump, J.

The words complained of were used by second-named Defendant in a rambling discourse over first-named Defendant's radio on the afternoon of the 14th January, 1976. This ranged from the buying potential of money (that could only buy a coup), touched on the democratic process and what was happening in Chile, stressed the need to be alert and protect ourselves here. It then went on to men-

tion that morning's issue of the Plaintiff's newspaper, describing one of its headlines in choice language, and had it's high point in the assertion that Plaintiff was thereby involved in a conspiracy to destroy the Constitution of the country. To round it off second-named Defendant invited Plaintiff to sue him for libel! This has now come to pass.

* * *

I have regard to the conditions then obtaining in the country so widespread and notorious that I can take Judicial Notice of them. Violence stalked the land, murders were commonplace, Public Opinion was outraged. Fear abounded.

I have regard to the nature of this libel which imputed to the Plaintiff the commission of the criminal offence of conspiracy which had in itself the seeds of Treason Felony striking at the roots of government.

I am here concerned with the award of compensatory damages only, and this against two Defendants. The villain in the piece was certainly second-named Defendant. He initiated the libel and carried it through single-handed. Surely this is the conduct for which the Plaintiff should be compensated. Without him there would be no libel. First-named Defendant was the silent principal in the background. He was vicariously liable nevertheless for that conduct, as I hold that principle of Respondeat Superior applies.

* * *